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UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF CALIFORNIA

MARCUS WAGNER, an individual, on
behalf of himself and all others similarly
situated,

Plaintiff,

vs.

DRIVEN SPORTS, INC.,
and DOES 1 through 50, inclusive,

Case No:

CLASS ACTION
COMPLAINT FOR DAMAGES

JURY TRIAL DEMANDED

Plaintiff Marcus Wagner, by and through undersigned counsel, on behalf of himself and
all other persons and entities similarly situated, sue Defendant DRIVEN SPORTS, INC. and for
his complaint alleges, upon information and belief and based on the investigation to date of his
counsel, the following:

NATURE OF ACTION

1
2 1. This is a civil class action brought by Plaintiff and on behalf of a class of persons
3 similarly situated, ("class members"), who purchased dietary supplement Driven Sports Craze
4 ("DSC") from Defendant.

5 2. The class members are all persons located within the State of California who
6 purchased DSC.
7

8 3. Defendant advertises, formulates, manufactures, markets, sells and distributes DSC.

9 4. Bodybuilding.com ("BB") is an online retailer of DSC.

10 5. The dietary supplement industry is a growing and extremely competitive business
11 environment, especially the sports (bodybuilding) supplement segment.
12

13 6. DSC is generally categorized as a "Pre-Workout" supplement.

14 7. Pre-Workout supplements most often contain high levels of stimulants, which push
15 manufacturers to keep increasing the levels of these stimulants to stay competitive in the market.
16

17 8. Defendant advertises labels and markets DSC in a misleading and deceptive manner.

18 9. Defendant represents that DSC is a "dietary supplement" that is legal and safe.

19 10. Defendant spikes DSC with a methamphetamine analog not declared on DSC's label,
20 in an effort to capture market share of the pre-workout segment of sports supplement market.

21 11. Plaintiff brings this action challenging Defendant's mislabeling of the 'product on
22 behalf of himself and all others similarly situated, under California's Unfair Competition Law,
23 False Advertising Law and Consumer Legal Remedies Act.
24

25 12. Plaintiff seeks an order compelling Defendant to (1) cease marketing DSC using the
26 misleading tactics complained of herein, (2) conduct a corrective advertising campaign, (3)
27
28

1 restore the amounts Defendant has been unjustly enriched and (4) destroy all misleading and
2 deceptive materials.

3 **JURISDICTION AND VENUE**

4 13. This Court has jurisdiction over all causes of action asserted herein.

5 14. Jurisdiction is proper in this court pursuant to 28 U.S.C. §1332 (d) because there are
6 at least 100 class members in the proposed Class, the combine claims of proposed class members
7 exceed \$5,000,000 exclusive of interest and costs and at least one Class Member is a citizen of a
8 state other than Defendant's state of citizenship.
9

10 15. Plaintiff will likely have evidentiary support after a reasonable opportunity for
11 further investigation and/or discovery regarding Defendant's sales of DSC during the class
12 period.
13

14 16. Venue is proper pursuant to 28 U.S.C. §1391(b) (1) because defendant conducts
15 substantial business in this District, has sufficient minimum contacts with this District and
16 otherwise avail itself of the market in this District, through the promotion, sale and marketing of
17 their Product in this District.
18

19 17. Defendant and other out-of-state participants can be brought before this Court
20 pursuant to state and federal law.

21 **PARTIES**

22 18. During the Class period, Plaintiff and the class members purchased DSC through
23 BB's website www.bodybuilding.com and/or at a retail store and online retailers throughout
24 California. Plaintiff and the class members suffered an injury in fact caused by the false
25 fraudulent, unfair, deceptive and misleading practices set forth in this Complaint.
26
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28

1 19. Plaintiff is a resident of the County of Contra Costa, State of California and the
2 events set forth in this Complaint took place therein, who, on or about May/June 2013, purchased
3 DSC Driven Sports Craze for his use and not for resale, from GNC.

4 20. Defendant Driven Sports, Inc. is a New York corporation authorized to do and, is in
5 fact, doing business in California, with its principal place of business located at 672 Dogwood
6 Ave., Suite 329, Franklin Square, New York.
7

8 **FACTUAL ALLEGATIONS**

9 21. Plaintiff incorporates the foregoing paragraphs as if fully restate herein.

10 22. Plaintiff Wagner reviewed the Product's label, nutritional label supplement facts and
11 marketing material prior to purchasing DSC.
12

13 23. Defendant provides retailers such as GNC with label images and marketing
14 materials.
15

16 24. Plaintiff Wagner reasonably relied on the information provided by defendant when
17 making the decision to purchase DSC.

18 25. Plaintiff would have purchased another pre-workout product, if any at all, if she was
19 made aware of the presence of an illegal methamphetamine analog on DSC.

20 26. On information and belief Defendant intentionally manufactured DSC to contain a
21 methamphetamine analog, N,x-diethylphenylethylamine ("N,x-DEPEA").
22

23 27. "The supplement is labeled as containing a dendrobiumorchid extract comprising
24 several phenylethylamines including N,N-diethyl-phenylethylamine (N,N-DEPEA). N,N-
25 DEPEA is a structural isomer of the methamphetamine analog N,a-diethylphenylethylamine
26 (N,a-DEPEA)."
27
28

1 28. "Pharmaceuticals and banned substances have been detected in hundreds of
2 purportedly natural supplements. Recently, several athletes have been disqualified from
3 competition after testing positive for the methamphetamine analog N,x-DEPEA. Athletes have
4 routinely claimed they unknowingly consumed the banned stimulant in workout supplements.
5 Three samples from different lot numbers of Craze were analyze to detect the presence and
6 concentration of N,x-DEPEA. Two labs independently identified N,x-DEPEA in the supplement
7 using ultra high performance liquid chromatography (UHPLC) coupled to a LTQ Orbitrap XL
8 mass spectrometer and UHPLC-quadruple-time-of-flight mass (Q-TOF) spectrometer,
9 respectively. The identity of N,x-DEPEA was confirmed using nuclear magnetic resonance and
10 reference standard according to Cohen, P.A., Travis, J.C. and Venhuis, B.J. 92013), a
11 methamphetamine analog identified in a mainstream dietary supplement . Drug Test Analysis,
12 doi: 10.1002/dta.1578.
13
14

15 29. Defendant's failed to disclose the presence of the methamphetamine analog N,x-
16 DEPEA anywhere on the Nutritional Panel and or the Supplement Facts Panel of DSC.
17

18 30. Defendant's inclusion of N,x-DEPEA in DSC is dangerous and unlawfully.
19

20 RELIANCE AND INJURY

21 31. Plaintiff incorporates the foregoing paragraphs as if fully restates them.

22 32. When purchasing DSC, Plaintiff was seeking a product that has qualities described in
23 Defendants' advertising, labeling and marketing.

24 33. Plaintiff read and relied on the deceptive claims contained herein.

25 34. Plaintiff believed DSC had the qualities he sought, but DSC was actually
26 unsatisfactory to Plaintiff for the reasons described herein.
27
28

1 35. Plaintiff paid more for DSC and would have been unwilling to purchase DSC at all,
2 absent the false and misleading labeling complained of herein. Plaintiff would not have
3 purchased DSC absent these claims and advertisements.

4 36. For these reasons, DSC was worth less, if it all, than what Plaintiff paid for it.

5 37. Instead of receiving a product that fully disclosed the ingredients on its label, the
6 DSC Plaintiff purchased did not disclose the presence a methamphetamine analog.
7

8 38. Plaintiff lost money as a result of Defendant's deceptive claims and practices in that
9 he did not receive what he paid for when purchasing DSC.

10 39. Plaintiff altered his position to his detriment and suffered damages in amount equal
11 to the amount he paid for DSC.
12

13 **CLASS ALLEGATIONS**

14 40. Plaintiff incorporates the foregoing paragraphs as if fully restates them.

15 41. Plaintiff brings this action on his own behalf and as a Class Action pursuant to Rule
16 23 of the Federal Rules of Civil Procedure. Plaintiff seeks certification of the following
17 Class:
18

19 **California Class:** All Persons in the State of California who
20 have spent money purchasing DSC from four years from the
21 first-filed complaint in this action until the final disposition of this
22 and any and all related cases.
23

24 42. The abundance of class members renders joinder of all class members individually,
25 in one action or otherwise, impractical.

26 43. This action involves questions of law and fact common to Plaintiff and the class
27 members including but not limited to the following:
28

1 (a) Whether Defendant violated the California Civil Code Section 1750 et seq.;

2 (b) Whether Defendant violated the California Business & Professions Code Section
3 17200 et seq.;

4 (c) Whether Defendant violated the False Advertising Law, Cal. Bus. & Prof. Code
5 Section 17500 et seq. and;

6 (d) Whether Plaintiff and class members sustained damages and, if so, the (proper
7 measure of damages, restitution, equitable or other relief and the (amount and
8 nature of such relief.
9

10 excluded from the Class are the following: (a) any Judge and/or Magistrate presiding over this
11 action and members of their families; (b) Defendant and any entity in which Defendant has a
12 controlling interest and/or which has a controlling interest in Defendant and its legal
13 representatives, assigns and/or successors of Defendant; and (c) all persons who properly execute
14 and file a timely request for exclusion from the Class.
15

16 44. **Numerosity**: The class is composed of thousands of persons graphically dispersed
17 throughout the State of California and the United States, the Joinder of whom in one action is
18 impractical. Moreover, upon information and belief, the classes are ascertainable and
19 identifiable from Defendant's records.
20

21 45. **Commonality**: Questions of law and fact common to the class> ist as to all class
22 members and predominate over any questions affectingly individual members of the Class.
23 These common legal and factual issue include, but are not limited to the following:
24

25 (a) Whether Defendant violated the California Civil Code Section 1750 et seq.;

26 (b) Whether Defendant v violated the California Business & Professions Code Section
27 17200 et seq.;

(c) Whether Defendant violated the False Advertising Law, Cal. Bus. & Prof. Code Section 17500 et seq.; and

(d) Whether Plaintiff and class members sustained damages and, if so, the proper measure of damages, restitution, equitable or other relief and the amount and nature of such relief.

46. **Typicality**: Plaintiff's claims are typical of the claims of the class members, as all such claims arise out of Defendant's conduct in manufacturing, marketing, advertising, warranting and selling DSC, Defendant's conduct in concealing material facts regarding DSC, Defendant's false, fraudulent, fair and misleading claims and Plaintiff's and class members' purchasing DSC.

47. **Adequate Representation**: Plaintiff will fairly and adequately protect the interests of the class members and have no interests antagonistic to those of the Class. Plaintiff has retained counsel experienced in the prosecution of complex class actions, including consumer class actions involving false and misleading advertising, product liability and product design defects.

48. **Predominance and Superiority**: This class action is appropriate for certification because questions of law and fact common to the class members predominate over questions affecting only individual members and a class action is superior to other available methods for the fair and efficient adjudication of this controversy, since individual joinder of all class members is impracticable. Should individual class members be required to bring separate actions, this Court and Courts throughout California would be confronted with multiplicity of lawsuits burdening the court system while also creating the risk of inconsistent rulings and contradictory judgments. In contrast to proceeding on case-by-case basis, in which

inconsistent results will magnify the delay and expense to all parties and the court system, this class action presents far fewer management difficulties while providing unitary adjudication, economies of scale and comprehensive supervision by a single Court.

CAUSES OF ACTION

COUNT I

Violation of California Business & Professions Code

Section 17200 *et seq.*

(On Behalf of Plaintiff and the Class Against Defendant)

49. Plaintiff incorporates the foregoing paragraphs as if fully restated herein

50. California Business & Professions Code §17200 prohibits any "unlawful, unfair or fraudulent business act or practice."

51. The acts, omissions, misrepresentations, practices and non-disclosures of Defendant as alleged herein constitute "unlawful" business acts and practices in that Defendants' conduct violates the False Advertising Law and the Consumer Legal Remedies Act.

52. Defendant's conduct is further "unlawful" because it violates the Federal Food, Drug and Cosmetic Act and its implementing regulations as follows:

i. Defendant's deceptive statements violate 21 U.S.C. § 343 (a), which deems food (including nutritional supplements) misbranded when the label contains a statement that is "false or misleading in any particular";

ii. Defendant's deceptive statements violate 21 C.F.R. §101.14 (b) (3) (i), which mandates "substances" in dietary supplements consumed must contribute and retain "nutritional value" as defined under 21 C.F.R. § 101.14 (a) (2) (3) when consumed at levels necessary to justify a claim;

iii. Defendant's omission of N,x-DEPEA in the "Supplement Facts" panel violates 21 C.F.R. §101.36 (d);

1 iv. Defendant's omission of N,x-DEPEA on its nutrition label violates 21 C.F.R. § 101.4;

2 v. Defendant's DSC is an unapproved new drug as defined pursuant to 21 U.S.C.

3 §355(a); and

4 vi. Defendant 's DSC is a misbranded drug in violation of 21 U.S.C §§ 352 and 353.

5 53. Defendant's conduct is further "unlawful" because it violates California's Sherman
6 Food, Drug and Cosmetic Law which incorporates provisions of the Federal Food, Drug and
7 Cosmetic Act.
8

9 54. The acts, omissions, misrepresentations, practices and non-disclosures of Defendant
10 as alleged herein also constitute "unfair" business act and practices pursuant to the UCL in that
11 Defendant 's conduct is immoral, unscrupulous and offends public policy. Furthermore, the
12 gravity of Defendant's conduct outweighs any conceivable benefit of such conduct.
13

14 55. The acts, omissions, misrepresentations, practices and non-disclosures of Defendant
15 as alleged herein also constitute "fraudulent" business and practices under the UCL in that
16 Defendants' claims are false, misleading and have a tendency to deceive the class and the
17 general public.
18

19 56. In accordance with Bus. & Prof. Code § 17203, Plaintiff seeks an order enjoining
20 Defendant from continuing to conduct business through unlawful, unfair and/or fraudulent acts
21 and practices and to commence a corrective advertising campaign.
22

23 57. Plaintiff further seeks an order for the disgorgement and restitution of ill-gotten
24 monies from the sale of the Defendant's DSC, which were acquired through its tactics of
25 unlawful, unfair and/or fraudulent competition.
26

27 COUNT II

28 Violation of California Legal Remedies Act Cal. Civ. Code § 1750 et seq.
(On Behalf of Plaintiff and the Class Against Defendant)

1 58. Plaintiff incorporates the foregoing paragraphs as if fully restated herein.

2 59. This cause of action is brought pursuant to California's Consumers Legal Remedies
3 Act, Cal. Civ. Code § 1750, et. seq (the "CLRA").

4 60. Plaintiff is a consumer as defined by the CLRA.

5 61. Defendant is a supplier or seller as defined by the CLRA.

6 62. Defendant's conduct described herein involves consumer transaction as defined in
7 CLRA.

8 63. Plaintiff is further given the right to bring the suit himself pursuant to Civ Code
9 §1780 and on behalf of the class pursuant to §1781

10 64. Defendant has engaged in deceptive practices, unlawful methods of competition,
11 and or unfair acts as defined by Civ. Code §1750, et seq. to the detriment of the Plaintiff, the
12 general public and the class. Plaintiff, the general public and the class members have suffered
13 harm as a proximate result of the wrongful conduct of Defendant as alleged herein.

14 65. Defendants intentionally, knowingly and unlawfully perpetrated a harm upon
15 Plaintiff by the above-described facts.

16 66. Accordingly, Defendant violated the CLRA by engaging in the following practices
17 proscribed by the California Consumer Legal Remedies Act, §1770 (a)(2)(3)(5)(7)(8) and (9) and
18 in consumer transactions with the Plaintiff and the Class, which were intended to result in and
19 did result in the sale of the Flushmate System to the Plaintiff and the Putative Class:

20 (a) The following unfair methods of competition and unfair or deceptive
21 acts or practices undertaken by any person in a transaction intended to result
22 or which results in the sale or lease of goods or services to any consumer are
23 unlawful:
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1 (b) Misrepresenting the source, sponsorship, approval, or certification of
2 goods or services.

3 (c) Misrepresenting the affiliation, connection, or association with, certification by
4 another.

5 (d) Representing that goods or services are of a particular standard, quality, or
6 grade, or goods are of a particular style or model, if they are of another.

7 (e) Disparaging the goods, services, or business of another by false or
8 misleading representation of fact.

9 (f) Advertising goods or services with intent not to sell them as advertised.

10 67. Accordingly, Defendant violated the CLRA by engaging in the following practices
11 proscribed by the California Consumer Legal Remedies Act, §1770 (a)(2)(3)(5)(7)(8) and (9) and
12 in consumer transactions with the Plaintiff and the class, which were intended to result in and did
13 result in the sale of the Flushmate System to Plaintiff and the Putative Class.

14 68. Defendant's policies and practices are unlawful, unethical, oppressive, fraudulent
15 and malicious. The gravity of the harm to consumers and the general public from defendant's
16 policies and practices far outweighs any purported utility those policies and practices have.

17 69. Pursuant to CLRA §1780 (a), Plaintiff seeks an order enjoining Defendant from
18 engaging in the methods, acts and or practices alleged herein.

19 70. Pursuant to CLRA §1782, if defendant does not rectify its conduct within 30 days,
20 Plaintiff intends to amend this complaint to add claims for actual damages; restitution of money
21 to plaintiff, the class members and the general public; punitive damages, attorneys fees and costs;
22 and; such other and further relief the court deems just, appropriate and proper.

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COUNT III

Violation of the False Advertising Law, Business and Professions Code Sections 17500 et seq.

(On Behalf of Plaintiff and the Class Against Defendant)

71. Plaintiff incorporates the foregoing paragraphs as if fully restated herein.

72. Bus. & Prof. Code § 17500, et seq. (the "FAL") provides, in pertinent parts the following:

"It is unlawful for any ... c01voration . . . with intent or indirectly to dispose of real or personal property . . . or anything of any nature whatsoever or to induce the public to enter into any obligation relating thereto, to make or disseminate or cause to be made or disseminated before the public in this state, or to make or disseminate or cause to be made or disseminated from this state before the public in any state, in any newspaper or other publication, or any advertising device, any statement, concerning that real or personal property . . . or concerning any circumstance or matter of fact connected with the proposal. . .disposition thereof, which is untrue or misleading and which is known, or which by the exercise of reasonable care should be known, to be untrue or misleading . . . or . . . to so make or disseminate or cause to be so made or disseminated any such statement as part of a plan or scheme with the intent not to sell that personal property . . . so advertised . . . as so advertised."

73. In violation of Cal. Business and Professions Code §17500 et seq., the advertisements, labeling, policies, acts and practices described herein were designed to and did, result in the purchase and use of DSC.

74. Defendant knew and reasonably should have known that the advertising, marketing and labeling of DSC was untrue and/or misleading. But for these misrepresentations and or omissions, Plaintiff and the Class would not have purchased DSC.

75. Pursuant to Bus. & Prof. Code § 17535, Plaintiff and the Class seek to recover from Defendants restitution and disgorgement of earnings, profits, compensation and benefit obtained

1 as a result of the practices that are unlawful under Bus. & Prof. Code § 17500 e t se q. according
2 to proof.

3 **PRAYER FOR RELIEF**

4 WHEREFORE, Plaintiff and the class members demand judgment in their favor against
5 the Defendant, as follows:

6 A. A determination that this action proceed as a class action and Plaintiff adequately
7 represents the Class;

8 B. An Order requiring Defendant to bear the cost of class notice;

9 C. A return of all amounts paid for DSC sold by the Defendant to the Plaintiff and the
10 class members;

11 D. An Order requiring Defendant to immediately cease and desist from selling DSC in
12 violation of the law; enjoining Defendant from continuing to market, advertise, distribute and
13 sell DSC in the unlawful manner described herein; and ordering Defendant to engage in
14 corrective action;

15 E. For all equitable remedies available pursuant to Cal. Civ. Code Section 1780;

16 F. For an Order awarding attorneys' fees and costs;

17 G. For an order awarding punitive damages;

18 H. For an order awarding pre-judgment and post-judgment interest; and
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1 I. For such other and further relief deemed just and appropriate by the court.

2 **DEMAND FOR JURY TRIAL**

3 Plaintiff Wagner hereby demands a trial by jury on all claims so triable.

4
5 Respectfully submitted,

6 KNISBACHER LAW OFFICES
7 THE TERRELL LAW GROUP

8 Dated: November 6, 2013

9 
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